IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Chyrianne H. Jones,	:	
Plaintiff,	:	
v.	:	Case No. 2:08-cv-1047
St. Jude Medical S.C., Inc., et al.,	:	JUDGE GEORGE C. SMITH Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

This employment discrimination case is before the Court to resolve two related motions: plaintiff Chyrianne H. Jones' motion to compel discovery, and her motion for an extension of time to respond to the pending summary judgment motion. Both motions are fully briefed. For the following reasons, the motion to compel will be granted in part and denied in part, and a date will be set for responding to the summary judgment motion.

I. Background

In order to place the current motions into context, it is helpful to recite briefly the background of the parties' dispute and also the defenses raised by defendants (to whom the Court will refer collectively as "St. Jude") in their summary judgment motion.

The following facts appear not to be disputed. Ms. Jones worked for St. Jude, prior to her termination in 2009, as a sales representative. She sold pacemakers and internal defibrillators to doctors and hospitals. Before 2007, she had worked for St. Jude in Jacksonville, Florida selling similar devices. She moved to Columbus in 2007 for personal reasons.

Right before Ms. Jones began working in Columbus, St. Jude had purchased the business of a medical device distributor, Ohio

Pacesetters, through which it had been distributing its devices. When it took over the business directly, it assigned its sales representatives, including Ms. Jones, to various existing accounts. Her main account was Riverside Methodist Hospital.

The parties appear to dispute how well Ms. Jones performed in that account. For purposes of the two pending motions, it suffices to say that after St. Jude shifted some accounts around in 2008, Ms. Jones was no longer responsible for the Riverside account. In 2009, St. Jude claims that it underwent a nationwide reduction in force. Ms. Jones was selected for termination and was offered either a severance package or continued employment under a performance improvement plan. She chose the latter option. According to St. Jude, her performance never met the goals set for her, and it also discovered that she had secretly been tape-recording telephone conversations with customers and with St. Jude's employees or managers. It claims to have terminated her for those reasons. She asserts that St. Jude engaged in a pattern of discrimination and retaliation against her while she was still employed, and that she was terminated for the same impermissible reasons (i.e. considerations of sex and race).

II. The Motion to Compel

When it was filed, the motion to compel discovery addressed a fairly broad variety of unproduced documents. They included a portion of the employment file of Lewis Antol, another St. Jude sales representative; a tape recording of a conversation between Ms. Jones and defendant Michael Moore; St. Jude's nationwide ranking of its sales managers; documents relating to two other St. Jude employees, Jerry Hudson and Kevin Beale; certain documents prepared by a former St. Jude employee, Lou Major; 2006 sales data for the Riverside Hospital account; and notes made by St. Jude's in-house counsel, Robert Dunn, after he received a

letter from Ms. Jones' counsel on March 5, 2008. According to the motion to compel, many of these documents fell into the category of "promised but not yet produced," although in some cases St. Jude had advised Ms. Jones that the documents did not exist, were too burdensome to produce, or were protected by the work product doctrine.

In determining what issues are still in dispute, the Court now has the benefit not only of the remainder of the briefs filed regarding the motion to compel, but the memoranda which the parties filed in support of and in opposition to Ms. Jones' motion for an extension of time to respond to defendants' summary judgment motion. From those filings, the Court concludes that the dispute has been significantly narrowed.

First, it is undisputed that St. Jude produced additional documents after the motion to compel was filed. In her reply brief, Ms. Jones does not discuss further the documents relating to Mr. Antol, Mr. Hudson or Mr. Beale. Consequently, as of the date that memorandum was filed (January 13, 2011), those matters appear to have been resolved.

Second, in defendants' memorandum in opposition to the motion for an extension of time, St. Jude represents that it produced more documents after receiving the reply brief on the motion to compel. They included the tape recording and additional documents from Mr. Major. Further, St. Jude stated that the "raw sales data" for Riverside had already been produced, so that there should be no issue about that information. It suggested that the only outstanding issue was Mr. Dunn's notes, and, reiterating its position that those notes are covered by the work product doctrine, argued that no extension of time was needed because the Court would not be ordering any more documents to be produced.

Ms. Jones filed her reply memorandum on that motion on

January 31, 2011. In it, she disputes that she has been given the raw sales data for 2006 that she asked for. She also asserts that although she now has the documents prepared by Mr. Major, she has not been provided with any documents (particularly emails) showing that Mr. Moore received or had knowledge of these documents. Finally, she re-argues her position that Mr. Dunn's notes are not work product because his work was all done as part of a human resources investigation and that he was not functioning as an attorney when he participated in that investigation.

III. Sales Data and Major Documents

The Court will dispose of the issues concerning the 2006 sales data and Mr. Major's documents first because there do not appear to be any legal disagreements about them which require resolution. Rather, if anything, they involve some level of factual disagreement about what has been produced.

It is not entirely clear to the Court that the parties have engaged in any effort to resolve extrajudicially any issue about documents showing that Mr. Moore received or otherwise had knowledge of the business analyses prepared by Mr. Major. The focus of Ms. Jones' briefing up to the point of her reply memorandum on the motion for an extension was on the documents themselves. However, she does make a valid argument about the relevance of documents which might show that Mr. Moore knew about them. The Court assumes that defendants have no objection to producing any documents which might show whether, and when, Mr. Moore received these analyses. Consequently, if such documents have not been produced, defendants should be able to produce them within fourteen days.

The arguments about the sales data do not appear to be particularly responsive to each other. St. Jude has now represented that it has produced all of the relevant data both in

compilation form and in its native state, and that it has nothing else to produce. It specifically points to information contained in its July 10, 2010 production on this issue, asserting that the raw data can be found behind the third tab of the spreadsheet, which is labeled "data." In her response to this memorandum, Ms. Jones does not address this argument directly, or explain why whatever information appears behind that tab is insufficient; rather, she simply repeats her argument that the raw data from which the compilation was made must exist somewhere, and that defendants have yet to produce an affidavit indicating why it would be overly burdensome to retrieve it.

The state of the record makes it difficult for the Court to resolve this issue. The Court will, however, credit St. Jude's assertion that it has produced all of the underlying data, with the caveat that this matter may still require some conversation among counsel to insure that Ms. Jones' counsel understand exactly what has been produced and the basis of St. Jude's assertion that there is no additional information, in any format, that is responsive. If such additional conversations do not persuade Ms. Jones' counsel that everything which was requested has now been produced, and if counsel cannot resolve any further questions which arise, they shall request a conference with the Court on this issue. Otherwise, the Court will assume there is no longer a dispute about this data and that, on this subject, Ms. Jones has what she needs to be able to make her responsive argument to the summary judgment motion.

IV. The Dunn Documents

The only dispute that involves a legal determination (in addition to a factual determination) surrounds the documents (which seem to be limited to notes) prepared by St. Jude's in-house counsel, Robert Dunn, as part of St. Jude's 2008 investigation of Ms. Jones' claim of discrimination or

retaliation. St. Jude acknowledges that Mr. Dunn did an investigation of those claims, and that Ronald J. Spielberger, Vice President and General Counsel, wrote a letter to Ms. Jones' counsel, Judith E. Galeano, on May 16, 2008, stating that St. Jude had "fully investigated" her complaints and that it found "no ... violation of State and Federal Anti-discrimination." See Plaintiff Chyrianne H. Jones' Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for an Extension of Time to Respond to Defendants' Motion for Summary Judgment, Doc. No. 75, Exhibit 2. That letter was written in direct response to a letter from Ms. Galeano dated May 7, 2008. However, two months earlier, Ms. Galeano wrote a letter to two St. Jude human resources employees, Paul Woodstock and Laurie Valle, concerning the removal of Ms. Jones from the Riverside Hospital Account. The letter suggested that this action was both a breach of Ms. Jones' employment agreement and was taken for discriminatory reasons. Ms. Galeano asked that the letter be forwarded to counsel and that she be contacted within five days. See Defendants St. Jude Medical, S.C., Inc. and Michael Moore's Response in Opposition to Plaintiff's Motion to Compel, Doc. No. 52, Exhibit B. St. Jude argues that, at least for the time period between the March 5, 2008 letter and the May 16, 2008 response, Mr. Dunn conducted an investigation of Ms. Jones' claims which was separate from any human resources investigation and which was done for the purpose of evaluating St. Jude's legal position. Thus, it argues that any notes of this investigation need not be produced because they represent protected work product.

The work product doctrine is now derived from Fed. R. Civ. P. 26(b)(3). That rule exempts from discovery documents and tangible things which would otherwise be discoverable if they have been "prepared in anticipation of litigation or for trial by

or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)...." The limitations on discovery of work product can be overcome, however, "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of materials by other means." Even if the court does direct that trial preparation materials be disclosed, the court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

In determining whether the work product doctrine applies, the party seeking discovery has the initial burden of showing that the documents in question are "otherwise discoverable," that is, that they are both relevant to the action and not subject to any other claim of privilege. Once that burden has been met, the party opposing discovery must demonstrate that the documents were "prepared in anticipation of litigation or for trial...." Nothing else is necessary in order to support a claim that Rule 26(b)(3) is applicable. See generally Toledo Edison Co. v. G. A. Technologies, Inc., 847 F.2d 335 (6th Cir. 1988).

The legal issue which separates the parties as to whether Mr. Dunn's notes are work product is whether these notes were created "in anticipation of litigation." Ms. Jones did not file a charge of discrimination with the EEOC until June of 2008, and did not file her complaint in this case until November 6, 2008. Consequently, one of her arguments is that because litigation could not reasonably have been anticipated when Mr. Dunn took these notes, they cannot be work product. Her other argument is that, at least for a portion of the time when Mr. Dunn was conducting his investigation, a human resources employee, Ms.

Lapore, was also conducting an investigation which did not result in the production of any work product, and that because she and Mr. Dunn interviewed some of the subjects of the investigation together, he cannot claim work product for his notes of these interviews - and particularly for any investigation which post-dated May 16, 2008, the date on which Ms. Jones' counsel was told that an investigation (presumably Mr. Dunn's, because Ms. Lapore did not start her investigation until June 3, 2008) had been completed. St. Jude apparently concedes that these two investigations overlapped to some extent, but argues that because they were being conducted for different purposes (one for human resources reasons, and one for legal reasons) the overlap is irrelevant to the question of whether Mr. Dunn's notes constitute work product.

The first issue raised by Ms. Jones' memoranda is whether St. Jude could reasonably have anticipated litigation after receiving the March 5, 2008 letter from Ms. Galeano. Ms. Jones asserts that this letter contained no threat of suit and that it can be "ignored" for purposes of the work product analysis. She relies on decisions from the Courts of Appeals for the Third and Eighth Circuits, Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124 (3d Cir. 2000) and Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) in support of this argument.

Diversified, the earlier decision, involved an investigation into corporate practices which had been commissioned by the corporation's board of directors after it had been discovered, in the context of some proxy-related litigation, that the corporation may have created a slush fund to be used for unlawful purposes. A law firm was retained to conduct this investigation. It was not retained to represent the corporation in any particular litigation, and it prepared both a preliminary report

outlining how it intended to conduct the investigation, and a more thorough report after it had completed its work. The court held that the earlier memorandum was not protected by either the work product doctrine or the attorney-client privilege, and that in order for the work product doctrine to apply, the threat of litigation had to be more than a "remote prospect of future litigation" and not simply a suspicion that, because of the corporations' conduct, "litigation of some sort in the future" might occur. Id. at 604. Obviously, however, this decision is of limited assistance in evaluating St. Jude's claim that its investigation, which was undertaken after it received a specific letter from an attorney making specific claims of unlawful conduct, might constitute work product, because nothing of the sort occurred in the Diversified case.

Holmes involved a fact situation more similar to the one presented here. There, an individual who sought interest on a claim for benefits due under an ERISA plan sought those benefits first from the plan, through administrative channels, before he filed suit. The plan's attorney prepared a memorandum analyzing the claim for interest, which was then sought during discovery after the claim ripened into litigation. A magistrate judge had concluded that the memorandum was protected work product, but the Court of Appeals disagreed, holding that the fact that the memorandum was prepared shortly after the plan's attorney received a telephone call from an attorney representing the claimant was not, by itself, enough to prove that the memorandum was written specifically because there was a prospect of litigation. Rather, there was simply insufficient evidence in the record to satisfy the plan's burden of showing that the threat of litigation, and not some business reason, motivated the preparation of the memorandum.

Certainly, a letter from an attorney representing an

employee of a corporation suggesting that the corporation has discriminated against that employee or breached her contract may spur a business-related investigation into such allegations. It may also, however, lead the recipient to believe that the employee intends to litigate such issues to the extent that they cannot be resolved through the ordinary course of business decision-making. The question then becomes whether, under the test as articulated in this circuit, the March 5, 2008 letter created the type of anticipation of litigation necessary to justify denying Ms. Jones access to Mr. Dunn's notes on work product grounds.

The Court of Appeals discussed the parameters of this issue in United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006). It noted that various tests for when a party has an objectively reasonable anticipation of litigation could be found in decisions from other courts, and focused particularly on the question of when an IRS audit would lead a corporation to believe that it might be sued. The court concluded that, under the facts of that case, such a fear of litigation was reasonable under any test, because the likelihood that the IRS would challenge the transaction disclosed by its tax audit was "concrete" given the fact that the transaction was large, the IRS had challenged similar transactions in the past, and it was possible to identify the specific claims and specific transactions which would be at issue in that litigation. See id. at 600.

Courts interpreting Roxworthy have recognized that it did not definitively adopt a test on this question, but those courts have also concluded that Roxworthy reinforces the notion that the party claiming work product protection has the burden of showing both the existence of a subjective fear of litigation and the objective reasonableness of that fear, and the burden of coming forward with some admissible evidence that, in fact, the

anticipation of litigation was the motivating factor behind the preparation of the documents. See Gruenbaum v. Werner Enterprises, Inc., 270 F.R.D. 298 (S.D. Ohio 2010); Goldfaden v. Wyeth Laboratories, Inc., 2009 WL 2602437 (E.D. Mich. August 21, 2009). The needed evidence may be presented "in any of the traditional ways in which proof is produced in pretrial proceedings such as affidavits made on personal knowledge, depositions, or answers to interrogatories ...." Goldfaden, 2009 WL 2602437, *2.

Here, the Court's analysis is hampered somewhat by the fact that, as far as the Court can tell, St. Jude has not submitted an affidavit from Mr. Dunn explaining why he conducted an investigation or made the notes in question. However, the absence of such proof is not the basis on which Ms. Jones claims that these notes are not work product. Consequently, the Court will, as Ms. Jones has done, focus on the question of whether St. Jude could have developed an objectively reasonable belief that it might be called upon in the future to litigate the issues involved in this case when it received Ms. Galeano's March 5, 2008 letter.

Ms. Galeano's letter begins by stating that Ms. Jones had retained legal counsel to represent her concerning "adverse employment actions ....." It identifies one action in particular - the removal of the Riverside Hospital account - as being problematic, and it also identifies two separate legal claims which might be asserted out of that action, namely breach of contract and employment discrimination. It also states that, in Ms. Galeano's legal opinion based on her review of information received from her client, St. Jude's actions were "unwarranted." It concluded with a request that the matter be handled in the future on an attorney-to-attorney level.

Any investigation of these matters following receipt of this

letter would not be, as was the case in Diversified, simply an effort by St. Jude to find out about a potentially problematic corporate practice which did not involve a specific claim presented by a specific potential plaintiff. Further, this strikes the Court as materially different from the situation in Holmes, where it was entirely appropriate for the claimant, in the ordinary course of business, to present an interest claim to his own ERISA plan in an effort to receive payment in the ordinary course of business. Here, the letter in question does not involve routine business matters such as whether Ms. Jones was entitled to some additional compensation for work performed, but involves matters which are customary fodder for employment-related litigation. The request that any response come from St. Jude's attorneys only highlights the fact that Ms. Jones intended to communicate the fact that the matter had progressed beyond the point where she believed that it could be handled in the routine course of business. Even if that were not her intention, a reasonable person could well have concluded that it was. Thus, as was the case in Roxworthy, immediately after receiving the letter, St. Jude would have been able to identify with "concrete specificity" the claims and transactions which would be involved in any future litigation with Ms. Jones. Although there is nothing to suggest that Ms. Jones (unlike the IRS) had a custom or practice of litigating such issues, employees who believe that they have been victimized by workplace discrimination often do litigate, and the magnitude of the grievance here, involving a well-compensated employee and a major account, made that prospect more likely. Under all of these circumstances, the Court rejects Ms. Jones' argument that St. Jude could not reasonably have anticipated litigation after receiving the March 5, 2008 letter.

The other issue Ms. Jones raises, which appears to relate only to any investigation done by Mr. Dunn after May 16, 2008, is

that because the "legal department" investigation of Ms. Jones' claims had been completed by that date, any further actions he took could not have been performed in anticipation of litigation. She cites to deposition testimony which indicates, for example, that he sat in on an interview of Fred Suppes, another St. Jude employee, who was accused of making a racially-inappropriate comment and whose employment with St. Jude was ultimately terminated, and argues that he could not have been acting as St. Jude's attorney or preparing for litigation with Ms. Jones. She emphasizes that Mr. Dunn did not tell Mr. Suppes that when he appeared along with Ms. Lapore for the interview, he was doing so in his capacity as a legal advisor to the company.

The Court has little difficulty dealing with the propositions that an attorney, in order to be acting in anticipation of litigation, must disclose that fact to each person he or she interviews. That is simply not an element of the work product doctrine. Further, the mere fact that St. Jude sent Ms. Galeano a letter on May 16, 2008 stating that it had completed an investigation and found no basis for liability does not necessarily mean that it thought, or reasonably should have thought, that she would be satisfied with the response and that litigation had been avoided. It is not uncommon that unhappy employees are not pacified by letters which completely reject their claims and that, after receiving such letters, they choose to sue. Certainly, one might reasonably expect that response.

What is more troubling, however, is the fact that Mr. Dunn apparently did not conduct a completely independent investigation after May 16, 2008, but, particularly in the case of Mr. Suppes, accompanied a human resources representative while she was doing an "administrative investigation" of one of the items mentioned in Ms. Galeano's May 7, 2008 letter involving Mr. Suppes. Unlike the allegations made in the earlier letter, all of which can

reasonably be seen as dealing only with Ms. Jones' specific situation and her potential claims, the allegation involving Mr. Suppes which Mr. Dunn and Ms. Lapore subsequently investigated did not directly involve Ms. Jones (the alleged comment was directed toward Mr. Major), and the apparent reason for the investigation was not to address any legal claim of Ms. Jones', but to determine whether Mr. Suppes made the comment and whether he should be disciplined for it. There is nothing in the record to suggest that St. Jude was anticipating legal action either from Mr. Major or Mr. Suppes when this interview was conducted or that this threat of litigation was the reason why Mr. Dunn was at the interview. Further, St. Jude has apparently turned over Ms. Lapore's notes of this same interview.

The parties have not cited any cases dealing with the precise question of whether a single interview of a single witness, attended by both a non-legal employee and a legal advisor, and purportedly conducted for both business reasons and in anticipation of litigation, can be parsed to the point where the notes of the non-legal employee are legitimately subject to discovery, while the notes of the legal advisor are not. The Court's research has also not uncovered any case law on this exact issue. It is certainly the case that a non-lawyer may be called upon by a lawyer to assist in the creation of work product, so that the participation of non-lawyers in the work product process is not necessarily inconsistent with the assertion of a work product claim. See, e.g., IBJ Whitehall Bank & Trust Co. v. Cory & Associates, Inc., 1999 WL 617842, *6 (N.D. Ill. August 12, 1999), citing Allendale Mut. Ins. Co. v. Bull Data Sys., 152 F.R.D. 132, 136 (N.D. Ill. 1993). However, that precept does not cover this situation because St. Jude concedes that Ms. Lapore was at the interview for reasons unrelated to the potential for litigation from Ms. Jones, and it has not asserted

work product protection for her notes.

The Court leaves open the possibility that, in the proper circumstances, investigations protected by the work product doctrine and other types of investigations may proceed simultaneously and may even involve joint interviews of the same witnesses. However, especially given the fact that on this aspect of work product, like any other, the party asserting protection must meet its burden of proof through the production of some evidence, the Court finds that such unusual circumstances are not present here. Again, there is no affidavit from Mr. Dunn indicating why he participated in the interview of Mr. Suppes, so there is little, if any, proof on the subjective prong of the work product test. And, as far as the objective prong is concerned, there is no evidence (at least in the record the parties cite in their memoranda on this issue) that, after the May 16, 2008 letter was written, St. Jude received some new communication focusing on Mr. Suppes' comment that made it likely that its further investigation of that issue was related directly to that comment's relevance to Ms. Jones' threat of litigation. Therefore, the Court does not view the record as supporting a reasonable inference that St. Jude was responding to that threat (or, indeed, the threat of any specific litigation) when it undertook to determine if one of its employees had made a racially offensive comment about someone other than Ms. Jones. Thus, if Mr. Dunn has notes of the interview with Mr. Suppes, they must be produced. St. Jude may, however, consistent with Rule 26(b)(3)(B), redact from those notes any of Mr. Dunn's "mental impressions, conclusions, or legal theories" concerning the current litigation with Ms. Jones, if any such information is contained in those notes. That production should occur within fourteen days.

V. Ms. Jones' Motion for Extension

The disposition of these various discovery issues makes it relatively easy for the Court to resolve Ms. Jones' motion for an extension of time to respond to the pending summary judgment motion. She is not going to receive much, if any, information as a result of this order which she does not already have. Further, she has, as a consequence of the motions practice over discovery, already obtained a very substantial extension of time to formulate her response. The Court believes that, within twenty-one days of the date she receives any additional information about either the 2006 raw sales data or Mr. Dunn's notes, she should be able to file her response. Given that this additional discovery should be completed within fourteen days of the date of this order, the Court will fix the response date as a date thirty-five days from the issuance of this order. That date will likely not be extended due to any further disagreements about discovery, but any problems with the implementation of this order shall be brought to the Court's attention as promptly as possible.

VI. Disposition and Order

Based on the above discussion, Plaintiff Chyrianne H. Jones' Second Motion to Compel Discovery (#49) is granted in part and denied in part. Within fourteen days of the date of this order, St. Jude shall produce any documents relating to whether, and when, Mr. Moore learned of the business analyses done by Mr. Major. Further, within that same time frame, counsel shall confer with each other and resolve, if possible, any issues about St. Jude's production of sales data for the Riverside Methodist Hospital account in 2006, and St. Jude shall produce Mr. Dunn's notes of his interview of Fred Suppes. The motion is denied in all other respects. Plaintiff Chyrianne H. Jones' Motion for Extension of Time to Respond to Defendants' Motion for Summary Judgment (#67) is granted. That response shall be filed no later

than thirty-five days from the date of this order.

VII. Procedure for Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge